In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6236

J. D. BURKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of six counts charging that he aided and assisted in the preparation of false and fraudulent income tax returns for other persons, in violation of 26 U.S.C. 7206(2). He was sentenced to three years' imprisonment on one count and to concurrent five-year probation terms as to each of the other five counts. The court of appeals affirmed *per curiam* (Pet. App. 16-18).

The sole contention raised by the petition is that certain remarks by the prosecutor during his opening statement and in his summation to the jury deprived petitioner of a fair trial. In the course of his opening statement, the prosecutor said (R. 84):[1]

[1] "R." refers to the record in the court of appeals.

> The government submits that after you have had an opportunity to listen to each one of these witnesses as they explain the story from the witness stand, that you could find that these people are lower class people who depend on Mr. Burks to prepare their tax returns properly.

When defense counsel objected to the characterization "lower class people," the prosecutor explained that he meant no disrespect, but merely that "they would depend on [petitioner] to show them how to do things that they did not have the availability or education to understand how to do" (R. 85). In response, the court remarked: "That is the way the Court understood it" (*ibid.*). This reference was not directed at petitioner. It was not an appeal to prejudice but merely an attempt to inform the jury that the proof would disclose that petitioner took advantage of uneducated people in furtherance of his criminal acts.

The second challenged remark of the prosecutor was during his summation, in which he stated: "Over two hundred thousand dollars tax deficiencies. * * * He filled out every one of them. A bank robber doesn't make a haul like that" (R. 712-713). The court immediately sustained an objection and instructed the jury to disregard the remark (R. 713). The error, if any, was harmless, particularly in view of the fact that the prosecutor and the court repeatedly advised the jury that remarks of counsel were not evidence (*e.g.*, R. 709-710, 715, 720, 727) and that the evidence of guilt, as the court of appeals indicated (Pet. App. 17-18), was overwhelming.

The third remark by the prosecutor that petitioner draws into question was also made during the summation. The prosecutor stated (R. 714):

> That's the benefit [petitioner] gets out of preparing them wrong. He has got to get the refund back for them so they will come to him to get him to prepare them. That's his people down in that community. They rely on him. They come to him.

Since petitioner did not object to this remark at trial and it was not "plain error", he cannot contend now that it was prejudicial. *United States* v. *Kravitz*, 281 F. 2d 581, 586-587 (C.A. 3), certiorari denied, 364 U.S. 941; *United States* v. *Patterson*, 470 F. 2d 731, 732 (C.A. 5); *United States* v. *Webb*, 463 F. 2d 1324, 1328 (C.A. 5). In any event, the prosecutor's statement was a fair comment upon the evidence that petitioner took advantage of his clients' ignorance of tax matters.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.